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Supreme Court of Montana.

NORTHERN PACIFIC RAILROAD CO. v. SHIMMEL.

Where an office safe, kept at a railroad depot and used by the agent as a place of deposit for his daily receipts and valuable papers, is useful, and facilitates the successful operation of the road, it is not subject to levy under an execution on a judgment against the road.

APPEAL from First District, Custer county.

Saunders, Cullen & Saunders, for appellant, Northern Pacific Railroad Company.

WADE, C. J.—The only questions presented by this appeal are the following, viz. : 1. Does the evidence support the verdict and justify it? 2. Can the property of the Northern Pacific Railroad Company, in the territory of Montana, necessary, convenient and usual for running and operating said road, be lawfully seized and sold on execution to satisfy a judgment against said company? The property in question is a certain office safe, known as a "Diebold Combination Safe," which was seized on an execution issued out of the Probate Court of Yellowstone county, and taken from the plaintiff's depot and station at the town of Billings, in said county, and sold at auction, whereby the defendant claims title and right of possession. There was a verdict and judgment for defendant, and the plaintiff appeals.

As to the question whether the safe in controversy was a part of the usual, necessary and convenient equipment of the Northern Pacific Railroad Company, to enable it to operate its road at the time it was seized on execution, the testimony showed that the safe was in use by the plaintiff in and about its business as a railroad company in the depot at Billings, and was the only safe there; that it was in daily use by the company in its railroad business thereat, in keeping therein the moneys received by the company, which amounted to from two hundred to five thousand dollars per day, and in the preservation of its books of account of said railroad business at said station; that since the safe had been taken away, the agent at Billings, in consequence of its seizure, had been compelled to use safes of other parties by their consent, or else carry said moneys on his person; and in the opinion of said agent, said safe was, under the circumstances, a necessary part of the equipment and furniture of the plaintiff at said depot. It also appeared in evidence that there was a bank in said town, with a vault, wherein plaintiff was permitted

to deposit its moneys, books and papers, and that the plaintiff had procured no other safe since the one in question was seized. The foregoing was all the testimony at the trial concerning the questions proposed.

Upon this state of facts, the court instructed the jury as follows : " If it has been proven to your satisfaction, by a preponderance of evidence, that this safe was an office safe—was in use at the depot at this station ; that it was a usual and necessary part of the furniture in such office, in the preservation and safe-keeping of the moneys, books of account and valuable papers used in the transaction of the business of the plaintiff at such depot, and essential to the proper and safe conduct of such business there—then you should find for the plaintiff.

" In this case the question arises whether the property can be seized under execution for the payment of the debts of the company, inasmuch as it is held to be essential to the ordinary and economical use of the railroad company. There are certain classes of property belonging to railroad companies not subject to seizure and sale upon execution, such as their tracks, rolling stock, depots, shops and machinery, the use of which is essential to the operation of the road ; the reason for this being that such seizure and sale would result in the destruction of the property. There are certain other classes of property which may be seized and sold upon execution against a railroad company, such as lands and personal property not used in the running and operating of the road. Such property is always subject to execution, and it is the duty of the sheriff to search for this kind of property upon which to levy. An office safe is a necessary part of the furniture in a town where the business is important and extensive, and where the receipts of the railroad company are of so large an amount, and the books required to keep the accounts of the office contain valuable *memoranda*, as that it would be proper and prudent to preserve them from depredation or destruction by the use of a safe.

" And in this case, if you find from the evidence the business here so extensive, the receipts so valuable, as that a prudent man would require the use of a safe, then you should find for the plaintiff."

These instructions correctly stated the law, and were applicable to the facts in the case.

Rorer, in his work on Railroads (vol. 2, p. 901), says : " The

corporate franchise, rights and property of a railroad corporation, incidental thereto, cannot at common law be seized or sold upon execution at law against the company ; nor can the appurtenances, easements, appliances, or works used for the practical operation of the road be levied upon or sold at law upon execution separate from franchise, any more, or more legally, than the whole can be sold together. Such sale would impair its value and impede its use by the public ;” citing the following authorities : *Gue v. Tidewater Canal Co.*, 24 How. 263 ; *Rorer Jud. Sales*, sect. 1068 ; *Coe v. Columbus, P. & I. Rd.*, 10 Ohio St. 372 ; *Western Pa. Rd. v. Johnston*, 59 Penn. St. 290 ; *Youngman v. Elmira & W. Rd.*, 65 Id. 278 ; *Bayard's Appeal*, 72 Id. 453 ; *Thomas v. Armstrong*, 7 Cal. 286 ; *Stewart v. Jones*, 40 Mo. 140 ; *Hatcher v. Toledo, W. & W. Rd.*, 62 Ill. 477 ; *James v. Pontiac & G. Rd.*, 8 Mich. 91 ; *Ammant v. New Alexandria & P. T. Co.*, 13 S. & R. 212 ; *Plymouth Rd. v. Colwell*, 39 Penn. St. 337 ; *Rorer Jud. Sales*, sect. 1069.

In *Gue v. Tidewater Canal Co.*, TANEY, C. J., says : “ It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence.”

In *Herman on Executions* 551, it is said, the rule and common law is that the franchises and corporate rights of a corporation, and the means invested in them which are necessary to the existence and maintenance of the object for which they are created, are incapable of being transferred and granted away by any adverse process against them.

The plaintiff has the right to operate its road through the territory of Montana, and to have all the works and appliances essential to its useful existence as a railroad. This franchise was given by act of Congress, and the road made a military and post road for the benefit of the government of the United States, and whatever is useful in operating the road belongs to and goes with the franchise ; and no law of the territory or any other jurisdiction, less than that which created it, can in any manner rightfully invade or impair the privileges and immunities thus conferred. If an office safe at a depot in which the agent deposits and keeps his daily receipts and

valuable papers is useful and facilitates the successful operation of the road, it could no more be seized on execution than could a section of the rails, or road-bed, or water-tank. These things are incidental to the franchise and cannot be disturbed. They are the means by which the franchise is exercised. They are the necessary instruments of its use.

The charter of the plaintiff authorizes and empowers it to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad line, with the appurtenances, from Lake Superior to Puget Sound, and if an office safe at any depot on said road is useful and convenient to the plaintiff in the enjoyment of said franchise, then the same is protected from seizure on execution. This franchise, or right to maintain and enjoy the road, is not limited and restricted to what is barely necessary for that purpose, but extends to what is appropriate and useful, and actually in use. Railroad companies can be made to pay their debts, but the remedy is not by seizing and selling property that would destroy the road, and thereby prevent its earning money for its creditors.

The testimony shows, without question or contradiction, that this safe was an office safe, used by plaintiff in its depot at Billings station, in the regular daily business of the road, and that the same was a necessary part of the equipment and furniture of said depot for the purposes of such business. The court instructed the jury that if it had been proven by a preponderance of the evidence that the safe in question was an office safe, used in the depot at Billings, and that it was a usual and necessary part of the furniture in such office for the safe-keeping of moneys, books of account, and valuable papers used in the transaction of plaintiff's business, and essential to the proper and safe conduct of such business, then that they should find for the plaintiff. The jury, by the verdict for the defendant, must have found from the evidence that the safe was subject to sale, on execution, for the reason that the same was not a usual and necessary part of the equipment and furniture of said depot, and essential and proper to the safe conduct of the business of the road. There is no evidence to support such a finding or verdict. The verdict is a direct contradiction of all the evidence in the case.

The agent of the plaintiff testified that the safe, considering the business at the Billings depot, was a necessary part of the equipment and furniture of the depot for the purposes of such business,

and there was no evidence to contradict the agent, or to call in question his statement as to the necessities of plaintiff's business at that point. But the jury, in answer to a special issue submitted, say that the safe in controversy was not necessary in carrying on the business of the company. In this they contradict the only witness on the subject, and make a special finding, in the very face of all the testimony on the question submitted.

Appellate courts are slow to disturb the verdict of a jury, and will not do so if there is evidence to support the verdict (*Ming v. Truett*, 1 Mont. 328); but if the verdict is a flat contradiction of all the evidence in the case, and there is nothing to support it, it would be a reproach to the law, and to those who administer it, to permit such a verdict to stand.

Judgment is reversed, and cause remanded for a new trial.

GENERAL RULE.—The general rule at common law is that the franchises and corporate rights of a corporation are incapable of being transferred and granted away by any adverse process against it: *Herman on Executions* 551. Applying this rule to railways, it is said that the lands, easements or works appurtenant or essential to the practical use and operation of the franchise of the railway company cannot be sold separate from the franchise so as to impair its value or impede its use. One reason for the existence of this rule is that the public have an interest in the operation of the road which ought not to be destroyed or impaired in any controversy between the railroad company, which is the servant of the public in operating the road, and its creditors. As remarked by **WOODWARD, J.**, "though a (railway) corporation in respect to its capital is private, yet it was created to accomplish objects in which the public had a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked, therefore, either by the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corpo-

ration. The only remedy which the law allows to creditors against property so held is sequestration (9 W. & S. 28), and that remedy is consistent with corporate existence; whilst a power to alien or liability to levy and sale on execution would hang the existence of the corporation on the caprices of the managers, or on the mercy of its creditors, for, the corporation would cease to exist for the purposes of its institution where its means of subsistence were gone. It might still have a name to live, but it would be only a life in name. A railroad company could scarcely accomplish the end of its being after the ground on which its rails rest had been sold to a stranger:" *Plymouth Rd. v. Colwell*, 39 Penn. St. 339. And in support of the general rule may be cited the following cases: *Youngman v. Rd.*, 65 Penn. St. 286; *Plymouth Rd. v. Colwell*, 39 Id. 337; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27; *Ammant v. Turnpike Co.*, 13 S. & R. 210; *Coe v. Rd.*, 10 Ohio St. 372; *Gue v. Tide Water Canal Co.*, 24 How. 263.

Such being the rule and its reason, about which there is no especial conflict of authority, the inquiry is, what property is so essential to the operation of a railway and its lines as to be beyond the

reach of execution, and what property is not essential to the operation of a railway and may, therefore, be levied on under such process ?

PROPERTY EXEMPT FROM EXECUTION AS BEING ESSENTIAL TO THE EXERCISE OF RAILWAY FRANCHISES.—Tolls on a canal are essential to a franchise. So also are locks on a canal, the toll house or collector's office and the land surrounding the outlet locks : *Gue v. Tide Water Canal Co.*, 24 How. 257. See, also, *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27.

A turnpike road is essential to the franchise of a turnpike company : *Amman v. Turnpike Co.*, *supra*.

Tolls received on a railroad after judgment is rendered against the company and the appointment of a sequestrator are not bound by such judgment so as to give it a preference of payment out of them : *Leedom v. Plymouth Rd.*, 5 W. & S. 265. In *Seymour v. Milford & C. Turnpike Co.*, 10 Ohio 476, it was held that an execution cannot be levied upon the right of a company to take tolls unless notice has first been given according to the provisions of the Ohio statute to some receiver of the toll on the road.

Money payable by railroad for injuries to homestead is exempt from execution : *Kaiser v. Seaton*, 62 Iowa 463, 14 Am. & Eng. Rd. Cas. 405. The railway plant of a dock company authorized to construct a railroad is exempt from execution under the English Railway Companies' Act, though the railway is merely ancillary to the main object of the company : *Great Northern Rd. v. Taborin*, L. R., 13 Q. B. Div. 320 ; 20 Am. & Eng. Rd. Cas. 562.

The purchaser of a right of way under execution takes no title if he does not own the franchises of the company and the transferee of franchises may recover against him in ejectment : *Eastern Ala. Rd. v. Visscher*, 114 U. S. 340 ; 20 Am. & Eng. Rd. Cas. 566.

PROPERTY NOT EXEMPT FROM EXECUTION AS BEING ESSENTIAL TO THE EXERCISE OF RAILWAY FRANCHISES.—A canal basin is not a legitimate incident to a railway, having no authorized canal connection, and is not protected from levy and sale on execution against the company : *Plymouth Rd. v. Colwell*, 39 Penn. St. 337 ; and with reference to railroad lands, this general rule may be affirmed : Lands owned by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the company and are liable to be levied in execution and sold by the sheriff as are the lands of any other debtor. But the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation. See *Plymouth Rd. v. Colwell*, 39 Penn. St. 337 ; *Youngman v. Elmira, &c., Rd.*, 65 Id. 278.

Land of a foreign railroad corporation not chartered in a state is regarded as simple realty when levied on, but no order will be made affecting the interest of a domestic corporation not a party : *Chapman v. Pittsburgh, &c., Rd.*, 18 West Va. 184 ; 9 Am. & Eng. Rd. Cas. 484.

When judgment is obtained by a passenger against a railroad company for personal injuries, and execution is levied upon an engine, the execution will not be enjoined on application of creditors of a partnership of which the railroad company was a member, when the equities are equal, and it does not appear that partnership indebtedness existed when the property was taken in execution : *Lamoille Rd. v. Bizby*, 55 Vt. 235 ; 16 Am. & Eng. Rd. Cas. 474.

ROLLING STOCK.—There is a conflict of authority upon the point whether rolling stock is subject to execution or not. As pointed out by Mr. Wood, 3 Wood's Ry. Law 1624, 1625, in several states

rolling stock essential to the operation of the road, as cars, engines, &c., is held to be affixed thereto, so as to pass under a mortgage of the railroad, and not to be subject to levy or sale upon execution: *Gue v. Tide Water Co.*, 24 How. (U. S.) 257; *Youngman v. Elmira, &c., Rd.*, 65 Penn. St. 278; *Shamokin Valley Rd. v. Livermore*, 47 Id. 465; *Coney v. Pittsburgh, &c., Rd.*, 3 Phila. (Penn.) 173; *Macon, &c., Rd. v. Parker*, 9 Ga. 377; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431. But in New York (*Randall v. Elwell*, 52 N. Y. 521; *Hoyle v. Plattsburgh, &c., Rd.*, 54 Id. 314; *Stevens v.*

Buffalo, &c., Rd., 31 Barb. 590), New Jersey (*Williamson v. N. J. Southern Rd.*, 29 N. J. Eq. 311), New Hampshire, (*Boston, &c., Rd. v. Gilmore*, 37 N. H. 410), and Ohio (*Coe v. Columbus, &c., Rd.*, 10 Ohio St. 372), it is treated as personal property, and, as such, subject to levy and sale upon execution unless it has passed into the possession of the mortgagees. In some of the states the constitution expressly provides that it shall be regarded as personal property, as in Arkansas, Illinois, Missouri, Nebraska, Texas and West Virginia.

ADELBERT HAMILTON.

Supreme Court of Missouri.

DAVIS v. WABASH, ST. LOUIS & PACIFIC RAILROAD CO.

In an action against a common carrier for the loss of goods, where the defence is that the loss was occasioned by the "act of God,"—as in this case an extraordinary flood—the burden of showing that the negligence of the carrier contributed or cooperated with the act of God to produce the loss, is on the shipper.

The defence of the act of God may be shown under a general denial.

APPEAL from St. Louis Court of Appeals.

Noble & Orrick, for plaintiffs.

H. S. Priest, for defendant.

The facts are stated in the opinion, which was delivered by

RAY, J.—This action was begun by plaintiff, to recover damages sustained by his goods, consisting of silks and other valuable dry goods whilst in defendant's possession, as a common carrier. Upon a trial in the circuit court, plaintiffs had a verdict and judgment in their favor for \$6184,29, from which defendant appealed to the St. Louis Court of Appeals, where the same was affirmed, and defendant has appealed therefrom to this court.

The goods, when damaged, were in course of transportation from New York to East St. Louis, by "The South Shore Line" which, it appears, did a "transportation business" over several connected railroads, including that of the defendant.

The merchandise arrived at Toledo on the 11th day of February 1881, and the car, being in a crippled condition, was sent to the